No. 80-1414

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; and UNIVERSAL MARITIME SERVICE CORP.,

Petitioners.

On Motion for Leave to File Petition and Petition for Writs of Mandamus and Prohibition to the United States Court of Appeals for the Third Circuit; Collins J. Seitz, Chief Judge, and John J. Gibbons and Joseph F. Weis, Jr., Circuit Judges

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BRIEF FOR RESPONDENTS IN OPPOSITION

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Petitioners.

On Petition for Writs of Mandamus and Prohibition

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Consolidated Express, Inc. ("Conex") and Twin Express, Inc. ("Twin"), respectfully request that the Court deny the petition for writs of mandamus and prohibition against the Third Circuit Court of Appeals.

STATEMENT OF THE CASE

Respondents adopt that portion of the decision of the Third Circuit Court of Appeals on remand at App. A 3a-5a [1] as their statement of the case regarding all proceedings prior to the issuance of that decision.

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[1] Appendix A to petitioners' Motion For Leave to File Petition and Petition for Writs of Mandamus and Prohibition.

In *NLRB* v. *International Longshoremen's Ass'n*, 100 S. Ct. 2305 (1980) ("*ILA*"), this Court held that the NLRB applied an incorrect legal standard in deciding the same issue on which the Third Circuit had applied collateral estoppel against petitioners. Therefore, on remand, the Third Circuit "reconsider[ed] those parts of [its] decision which directed that the district court give collateral estoppel effect on the existence of an unfair labor practice to the Second Circuit judgment. Those are Parts IV-A and Part V-A-1." (App. A at 8a-9a.) Because the judgment of the Second Circuit had been vacated, the Third Circuit vacated its decision giving collateral estoppel effect to it. (*Id.* at 9a.)

The court of appeals then remanded the case to the district court with instructions to defer a final hearing on the labor law issues presented by Counts I and III of respondents' complaints until several unfair labor practice cases now pending before the NLRB have been concluded. (*Id.* at 9a, 13a.)[2] Finally, the court of appeals affirmed the district court's denial of summary judgment on both counts and instructed it to proceed in accordance with its original opinion if the NLRB again concludes the Rules constitute unfair labor practices and to disregard Part IV-A and Part V-A-1 of the opinion if the Board upholds the Rules. (*Id.* at 13a-14a.)

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[2] In those proceedings, the Board is adjudicating the legality of the Rules on Containers ("Rules") in accordance with the standards set out in this Court's decision in *ILA*. As the Third Circuit indicated, petitioners successfully petitioned the Second Circuit to recall its mandate, vacate its judgment, and remand the unfair labor practice proceeding involving the parties in this case to the Board. (App. A at 9a & n.3.) This proceeding has been consolidated by the Board with other similar proceedings "before a single administrative law judge on an expedited schedule." (*Id.* at 9a & n.4.)

SUMMARY OF ARGUMENT

The Third Circuit properly construed and complied with this Court's mandate. The terms of the Third Circuit's remand to the district court are consistent with this Court's disposition of *ILA* and are supported by sound considerations of policy and efficiency in judicial administration. Petitioners seek to raise issues which were not touched on by this Court in *ILA* and for which they have an adequate remedy by appeal.

REASONS FOR DENYING THE WRIT

1. The Third Circuit Fully Complied With the Mandate of This Court.

A writ of mandamus is available from this Court where a lower court fails to execute or misconstrues this Court's mandate. *See, e.g., General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895). This is not such a case.

The mandate of this Court directed the Third Circuit to give "further consideration" to its decision "in light of" this Court's decision in *ILA*. *International Longshoremen's Ass'n* v. *Consolidated Express, Inc.*, 100 S. Ct. 3040 (1980). On its face, the Third Circuit's most recent opinion belies any claim that it failed to comply fully with this Court's directive. Nor, given the latitude afforded the Third Circuit by that mandate, can it be seriously argued that the Third Circuit misconstrued it. Petitioners simply are dissatisfied with the result of the Third Circuit's reconsideration.

2. The Third Circuit Properly Exercised Its Authority in Remanding the Case to the District Court.

Petitioners' principal dispute is with the Third Circuit's remand to the district court with instructions to

stay further proceedings on Counts I and III until there is a final determination, including judicial review, of the related unfair labor practice proceedings now pending before the Board.

The Third Circuit's disposition was clearly a proper exercise of its jurisdiction on remand. A court of appeals, on remand from this Court, may in turn remand the case to the district court. *See Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 583 F.2d 469 (9th Cir. 1978). Moreover, a remand to a district court with instructions to stay further proceedings pending an administrative determination is clearly within the authority of an appellate court. *See AT&T* v. *Delta Communications Corp.*, 590 F.2d 100, 102-03 (5th Cir. 1979), *cert. denied*, 444 U.S. 926 (1979); *Sharkey* v. *Penn Central Transportation Co.*, 493 F.2d 685, 692 (2d Cir. 1974) (Mansfield, J. and Lumbard, J. concurring). *See also International Ass'n of Heat & Frost Insulators* v. *United Contractors, Inc.*, 483 F.2d 384, 400-02 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974); *Mitchell* v. *Mid-Continent Spring Co.*, 466 F.2d 24, 27 (6th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

The action taken by the Third Circuit was particularly appropriate "in light of" this Court's disposition of *ILA* remanding that case to the Board to determine the legality of the Rules under Section 8(e) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158 (e). On this point, this Court held that:

> These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. Since the Board has not had an opportunity to consider these questions in relation to a proper understanding of the work at issue, we will not address them here. We emphasize that neither our decision nor that

> of the Court of Appeals implies that the result of the Board's reconsideration of this case is foreordained.[3]

The Third Circuit explicitly acknowledged this holding in formulating the terms of its remand. (App. A at 10a.)

The action taken by the Third Circuit is also supported by the sound considerations of policy and efficiency in judicial administration set out in its opinion. Both the Board and the district court have before them the same parties, seeking to litigate the same labor law issue, arising out of the same facts. The procedure fashioned by the Third Circuit avoids, in Judge Gibbons' words, "the problem of the obvious duplication of effort" (App. A at 11a) that would result from the course advocated by petitioners. Moreover, the legal issue is one which the Board has "primary responsibility" for resolving,[4] and, given the importance of the labor law questions to the antitrust issues raised in respondents' complaints, the district court "cannot but be enlightened by the Board's opinion on whether the Rules on Containers are lawful as a matter of labor law." (App. A at 11a-12a.) Finally, as Judge Gibbons points out, in the absence of a stay, "there is the distinct possibility that if both cases go forward simultaneously, they may wind up before [the Third Circuit], or before two separate courts of appeals, with conflicting factual determinations, subject to differing standards of appellate review." (*Id.*)

3. Petitioners' Claims Are Otherwise Premature and Without Merit.

Petitioners claim that they would be impermissibly denied their right to a jury trial should a future determination of the NLRB that the Rules constitute an unfair

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[3] 100 S. Ct. at 2317 (footnote omitted).

[4] *See* AT&T v. Delta Communications Corp., *supra*, 590 F.2d at 102.

labor practice be given collateral estoppel effect. This Court's decision in *ILA* did not in any way concern the question of the right to a jury trial. Furthermore, petitioners' jury trial claim will be ripe *only* if the NLRB again decides that the Rules violate the LMRA.[5] If that occurs and if that decision is then given collateral estoppel effect, petitioners will be free to seek review on appeal to this Court. Mandamus is therefore inappropriate. *See, e.g., Ex parte Union Steamboat Co.*, 178 U.S. 317, 319-20 (1900). *See also Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383-84 (1953).

Petitioners also claim that the Third Circuit failed to reconcile *ILA* with its holding on the nonstatutory labor exemption to the antitrust laws. However, it is clear beyond cavil that the scope of the nonstatutory labor exemption was not considered by this Court in *ILA* so that this Court's mandate cannot be said to have required the Third Circuit to reconsider the issue on remand. Moreover, petitioners' claim is premature. The Third Circuit's alleged failure to reconcile its articulation of the nonstatutory exemption with this Court's decision in *ILA* could adversely affect petitioners *only* if the Board first holds that the Rules violate the LMRA[6] *and* if petitioners then fail to satisfy the prerequisites for the exemption as defined by the Third Circuit. Assuming *both* of these events occur, petitioners may then raise the issue on appeal to this Court. The petition for a writ

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[5] The Third Circuit's opinion on remand clearly indicates that if the Board decides in favor of petitioners, the district court is to disregard its holding on collateral estoppel. (App. A at 14a.)

[6] The Third Circuit's holding regarding the nonstatutory labor exemption *assumes* that the Rules are illegal as a matter of federal labor law and then proceeds to consider the circumstances, if any, in which such conduct "can nevertheless be held to be within the nonstatutory antitrust exemption . . . ." Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 512 (3d Cir. 1979), *vacated*, 100 S. Ct. 3040 (1980).

of mandamus should, therefore, be denied. *See, e.g., Ex parte Union Steamboat Co., supra,* 178 U.S. at 319-20. *See also Bankers Life & Casualty Co.* v. *Holland, supra,* 346 U.S. at 383-84.

CONCLUSION

For the foregoing reasons, the petition for writs of mandamus and prohibition should be denied.

Respectfully submitted,

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